

because of her father's claimed disability. And, no discrimination is claimed against Petitioner, yet she seeks monetary damages. According she lacks the requisite status to bring this issue before this Court.

CONCLUSION

For these reasons, Lauren Popovich's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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**In The
Supreme Court of the United States**

LAUREN POPOVICH,

Petitioner,

v.

CUYAHOGA COUNTY COURT OF COMMON
PLEAS, DOMESTIC RELATIONS DIVISION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**REPLY IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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ARGUMENT

1. AN INCOMPLETE FACTUAL RECORD DOES NOT BAR ACCEPTANCE OF A PETITION FOR A WRIT OF CERTIORARI

Respondent argues that certiorari is inappropriate due to the incomplete factual record in this case. Specifically, Respondent suggests that Petitioner prematurely concludes that Petitioner was "an aggrieved individual" under the terms of the Americans with Disabilities Act ("ADA") and that the Petitioner "suffered damage." See Respondent's *Response in Opposition to Petitions for Writ of Certiorari* at 4-5. In the same vein, Respondent disputes Petitioner's statement that her father was "disabled" and the "victim of discrimination." *Id.* at 5.¹ Of course, Respondent's attempt to use the incomplete nature of the factual record as a weapon to argue against a grant of certiorari reveals a complete misunderstanding as to the procedural posture of this litigation. Quite simply, an inquiry into the factual record is unnecessary when reviewing a case decided on the legal issue of prudential standing.²

¹ Notably, Respondent points to no evidence or judicial determination that would support its claim that Petitioner misstates the factual record before this Court.

² Viewed most generously, Respondent's argument regarding the factual incompleteness of the record before the Court may be an attempt to dispute Petitioner's Article III standing. However, this line of argument is unavailing under the explicit ruling of the United States District Court for the Northern District of Ohio:

The injury alleged by Ms. Popovich in her Complaint was "that she was denied access to her father" for five years. According to the Complaint, this alleged injury was caused by the Common Pleas Court's failure to accommodate Mr. Popovich's hearing problems and the resulting delay in the custody case. *Taking the allegations in the Complaint as true,*

(Continued on following page)

As noted in Petitioner's brief, Petitioner is seeking review by this Court after her lawsuit was dismissed by the United States District Court for the Northern District of Ohio on the grounds that Petitioner lacked prudential standing. See Petitioner's *Petitions for a Writ of Certiorari* at 4, ¶ 5. In ruling upon a motion to dismiss, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197 (1975) (internal citations omitted). Thus, at this stage in the proceedings it is unnecessary, if not improper, for a court to consider issue of fact.

To demand that Petitioner prove the elements of her case at this point is to put the cart before the horse. Should certiorari be granted in this case, this Court will decide whether Petitioner has standing under Article II of the ADA. If this Court were to rule in favor of the Petitioner, the Petitioner's case would be remanded to the district court with instructions that discovery be conducted and a trial held. It is at that trial, and not before, that the issues of fact should be decided. Accordingly, Respondent's suggestion that "the record lacks the factual underpinnings necessary to properly consider the issue of

as the Court must do in deciding a motion to dismiss, Ms. Popovich has averred that she personally suffered some injury. Viewing the Complaint in the light most favorable to Ms. Popovich, this injury could be traced to the alleged conduct of the Common Pleas Court. This injury could be redressed by an award of damages. Therefore, the minimum standing requirements of Article III are met.

See Memorandum of Opinion and Order Granting Defendant's Motion to Dismiss, May 3, 2004, at fn. 5. (Emphasis added).

standing” lacks merit and is incongruent with the procedural posture of this case.

2. THE QUESTION PRESENTED IS NOT BARRED BY THE ELEVENTH AMENDMENT.

Respondent argues that Petitioner’s brief frames the question presented as one requiring an equal protection analysis and this Court has previously held that an “[e]qual [p]rotection challenge seeking money damages against the State Court under Title II of the ADA is barred by the Eleventh Amendment.” *See Respondent’s Response In Opposition To Petition For Writ of Certiorari* at 6 (citing *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004)). Respondent’s argument is unavailing on two distinct grounds.

A. Petitioner’s Complaint Adequately Alleged Due Process Violations Which Resulted In Damage to Petitioner.

Respondent argues, that the Question Presented “is permeated with hard-core, traditional Equal Protection language.” *See Respondent’s Response In Opposition To Petition For Writ of Certiorari* at 7. Missing from Respondent’s analysis however, is the fact that Petitioner has properly alleged the existence of due process violations, the result of which was injury to Petitioner. Specifically, Petitioner’s complaint lays out the ways in which Respondent stayed and otherwise delayed Mr. Popovich’s custody hearing, thereby denying him a meaningful opportunity to be heard due to his disability and in retaliation for his efforts in seeking a reasonable accommodation. *See Petitioner’s Second Amended Complaint*.

Within the past two years, this Court has once again recognized that “access to the courts” represents a fundamental right guaranteed by the due process clause. *Tennessee v. Lane*, 541 U.S. 509, 533-534, 124 S.Ct. 1978 (2004). Indeed, it is well understood that the Fourteenth Amendment’s due process guarantee requires that all individuals be provided “the opportunity to be heard at a meaningful time and in a meaningful manner.”³ *City of Los Angeles v. David*, 538 U.S. 715, 716, 123 S.Ct. 1895 (2003) (internal quotations and citations omitted). Further, this Court has recognized that the very nature of a child custody proceeding involves due process rights that should be protected with acute vigilance. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 27, 101 S.Ct. 2153 (1981) (in a child custody case “the State has an urgent interest in the welfare of the child . . . [and] in an accurate and just decision.”); Clearly then, the “termination or alteration of parental rights requires procedural safeguards under the Due Process Clause . . .” *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 276 F.3d 808, 813-814 (6th Cir. 2002) (citing *Lassiter*, *supra*, 452 U.S. at 27, 101 S.Ct. 2153). On the basis of these precedents, it is apparent that Petitioner’s father was denied due process as a result of Respondent’s actions which resulted in the denial of his opportunity to “be heard at a meaningful time and in a meaningful manner.”

³ It is this due process right to a hearing at a meaningful time and in a meaningful manner upon which Petitioner bases her claim, not, as Respondent suggests, the right to a “speedy trial.” See Respondent’s *Response in Opposition to Petition for Writ of Certiorari* at 7.

This Court's precedents also establish that Petitioner herself was entitled to due process protections during the pendency of the child custody case. Specifically, this Court has historically recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982) (internal citations omitted). In this case, Petitioner's freedom to choose to live with, let alone visit, her father was denied due to Respondent's treatment of her father. Thus, as a result of Respondent's actions, Petitioner was denied due process and suffered an injury as a result.

In sum, Petitioner has alleged facts that, if proven, would be sufficient to establish that Respondent denied Petitioner's father his due process on the basis of his disability and/or his actions in seeking a reasonable accommodation and in turn denied Petitioner due process by preventing a resolution to a child custody case in which she, more than any other litigant, was affected. Having alleged an actual violation of the Fourteenth Amendment, Plaintiff has alleged sufficient facts to maintain a claim under Title II of the ADA. *United States v. Georgia*, ___ U.S. ___, 2006 U.S. Lexis 759 at **13. Accordingly, Respondent is not immune from suit under the Eleventh Amendment.

B. Recent Precedent Suggests That Respondent Is Not An Arm Of The State And Therefore Not Immune From A Suit Seeking Money Damages On Equal Protection Grounds.

Though it is unnecessary for this Court to address the issue, the Respondent herein is not an arm-of-the-state. Eleventh Amendment immunity from suit extends to

States and state officials "in appropriate circumstances . . . but does not extend to counties and similar municipal corporations. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568 (1977). In order to enjoy the immunity inherent in the Eleventh Amendment, Respondent must establish that it is an "arm-of-the-state." See *Regents of the University of California v. Doe*, 519 U.S. 425, 429-430, 117 S.Ct. 900 (1997) (internal citations omitted). On the basis of the United States Supreme Court's ruling in *Regents of the University of California*, *supra*, the Sixth Circuit Court of Appeals recently revisited the question of the criteria to be considered when determining whether an entity qualifies as an "arm-of-the-state."⁴

In *Regents of the University of California* this Court stated that when conducting an arm-of-the-state analysis, it is of "considerable importance" whether a judgment would be enforceable against the state treasury. *Id.* at 430. This analysis was consistent with previous Supreme Court precedent, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S.Ct. 394 (1994) ("the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations"), and has been recognized and incorporated in Sixth Circuit precedent. *Brotherton v.*

⁴ Just prior to this Court's decision in *Regents of the University of California*, the Sixth Circuit considered whether a county court could be considered an arm of the state in *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997). In *Mumford*, the Sixth Circuit found that Ohio's county courts must be considered arms-of-the-state because they are created by Ohio Constitution and state statute. *Id.* at 268-270. Subsequently, in *Alkire v. Irving*, 330 F.3d 802 (6th Cir. 2003), the Sixth Circuit recognized that in deciding *Regents of the University of California* as it did "the Supreme Court has taken apart the foundation of our decision in *Mumford* since it was decided." *Id.* at 811.

Cleveland, 173 F.3d 552, 560-561 (6th Cir. 1999) (recognizing that a state's financial responsibility is the primary factor, if not the only one, to be considered in performing an arm-of-the-state analysis).

The Sixth Circuit recently took up the arm-of-the-State issue again in *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc). In *Ernst*, the plaintiffs brought a class action lawsuit against the retirement system for state judges, as well as several officials responsible for the administration of that system. *Id.* at 354-355. In deciding the case, the Sixth Circuit found that the state retirement system for judges *was* an arm-of-the-state. *Id.* at 359. The court's analysis considered several factors. However, the primary factor considered by court was whether the state would ultimately be liable to plaintiffs for any judgment rendered against the judicial retirement system. *Id.* at 359-360. On the basis of Michigan statute, the Court found that the state treasury would be responsible for any judgment that exceeded the financial reserves of the retirement system and that the retirement system therefore had to be considered an arm-of-the-state. *Id.* (citing Mich. Comp. Laws § 38.2302(1)).

Applying these cases, Ohio statute makes it clear that a county court of common pleas is not an arm-of-the-state. Specifically, Ohio Rev. Code § 307.01 (2005) provides that the board of county commissioners is required to appropriate funds "reasonably necessary for its operations" to the county court of common pleas. In addition, if a board of county commissioners fails to appropriate sufficient funds, the statute authorizes the court of common pleas to pursue a mandamus action in the county court of appeals to require the appropriation of funds sufficient "to meet all the administrative expenses of the court." *Id.* On the basis

of this statute, it is apparent that the county government, not the State of Ohio, would ultimately be responsible for any judgment rendered against Respondent in this case. Accordingly, because the state does not have any financial exposure arising from a potential judgment against Respondent, Respondent is not entitled to immunity from suit under the Eleventh Amendment.

Nevertheless, this court need not consider this issue because Respondent did not argue for the application of Eleventh Amendment sovereign immunity when this case was in front of the Sixth Circuit Court of Appeals. See Sixth Circuit Proof Brief of Defendant-Appellee Cuyahoga County Court of Common Pleas, Domestic Relations Division, filed October 4, 2004. Indeed, Eleventh Amendment precedent was not applied by the Sixth Circuit when it decided to affirm the trial court's ruling. See *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 150 Fed. Appx. 424 (6th Cir. 2005). Accordingly, the Eleventh Amendment question that Repondent's fervently seek to introduce is not properly before the court. See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 S.Ct. 505 (1954) (the United States Supreme Court "will not undertake to review what the court below did not decide.")
